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No. 83-620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA
Petitioner

v.

LARRY WAYNE RODGERS,
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE RESPONDENT

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FOR ARGUMENT

QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1001 should be so broadly construed as to prohibit oral, unsworn and unrecorded false statements given to investigatory agencies such as the Federal Bureau of Investigation and Secret Service.

2. If so, whether it is consistent with due process to apply a judicial enlargement of a cimrinal statute retroactively to this respondent.

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SUMMARY OF ARGUMENT

1. At issue in this case is whether 18 U.S.C. § 1001 should be so broadly construed as to encompass oral, unsworn false statements given to investigatory agencies such as the F.B.I. or Secret Service. In holding that such statements are not within the purview of the statute, the Eighth Circuit, in *Friedman* v. *United States*, 374 F.2d 353 (8th Cir. 1957), and *United States* v. *Rodgers*, 706 F.2d 854 (8th Cir.), *cert. granted*, ___ U.S. ___, No. 83-620 (Dec. 5, 1983), took a reasonable, common-sense view of the statute, an approach that is amply supported by the plain meaning of the words of the statute, case precedent, the legislative history of the statute, relevant rules of statutory construction and significant legal and social policy concerns.

2. Should this Court rule, however that the present Indictment does state a crime under § 1001, because false statements made to investigatory agencies are within the jurisdiction of an agency or a department of the Government, such a decision would announce a new rule in the Eighth Circuit and, consistent with due process, could not be made to apply retrospectively to this respondent.

I.A.

The term "jurisdiction" is an ambiguous word that is not susceptible to a single definition. It is often understood, however, to mean the power to finally dispose of a matter. In that commonly accepted sense, the Eighth Circuit's definition of "jurisdiction" is neither unique nor technical, but entirely consistent with an ordinary perception of that word.

Nor is the Eighth Circuit alone in recognizing such a definiton as a common meaning of the word "jurisdiction." Dictionaries, legal encyclopedias and case law from other jurisdictions all note the "clear distinction between the power to investigate and the jurisdiction . . . to decide and act upon a particular subject matter." *Friedman* v. *United States*, *supra*, at 367. Moreover, *Friedman* is consistent with a long line of case

authority holding that some effective limits must be placed on the statute.

While support may be found for the proposition that "jurisdiction" can, under some circumstances, take on a broader significance, there is no requirement, in construing an ambiguous penal statute, to assume that Congress intended the widest possible application.

I.B.

1. Not only is an overly broad reading not mandated, it is, in this instance, discouraged; for an ambiguous penal statute is ordinarily construed strictly to favor the party accused. The applicability of this rule of lenity is especially favored in the present case, because Congress in enacting the statute expressed no clear intent to reach the conduct involved here. Moreover, the concepts of fairness that underlie the purpose for the rule of lenity argue strongly for a strict construction in this case.

2. In addition to the rule of lenity, a second rule of statutory construction demands adoption of the Eighth Circuit's interpretation of § 1001. Petitioner's overly expansive reading of the statute results in absurd or unjust consequences, and so violates the maxim: courts should ". . . construe statutes so as to avoid absurd or glaringly unjust results. . ." *Sorrells* v. *United States*, 287 U.S. 435, 450 (1932). It is difficult to believe that Congress, in enacting § 1001, viewed oral, unsworn misstatements to the F.B.I. more seriously than perjury in a court of law; and, yet, acceptance of petitioner's interpretation of the statute can only lead to that absurd conclusion. Furthermore, an aggressively literal approach to the statute favored by the petitioner will provide a disincentive for investigative agencies to administer oaths in precisely those situations where Congress felt it especially important to do so. Finally, enlarging the scope of § 1001 beyond what was clearly contemplated by Congress will have the effect of undermining the judicially administered oath. This is an especially dangerous prospect because the procedural safeguards available under

the perjury law are not applicable in a § 1001 prosecution. Consequently, the unreasonable expansion of § 1001 urged by petitioner will provide an avenue through which the checks and balances inherent in a perjury prosecution can be easily bypassed.

I.C.

1. The legislative history of § 1001 provides no support for petitioner's construction of the statute. Instead, the congressional reports and debates reveal a limited purpose to expand the existing false statement law to provide protection against non-monetary frauds perpetrated against the newly formed regulative agencies created in response to the depression. There is no indication in the legislative history that Congress intended the far reaching consequences for § 1001 now claimed by the petitioner. In the absence of any such clear congressional intent, it would be an act of judicial legislation, at odds with the plain language of the statute, rules of statutory construction and the legislative history, to impose upon the slender frame of § 1001 the heavy burden proposed by the petitioner.

2. Moreover, subsequent legislative inaction lends weight to the conclusion that Congress had no intention in 1934 to criminalize misstatements to the F.B.I. Since the *Friedman* case was decided in 1967, Congress, on at least two occasions, considered, but failed to enact, legislation that would specifically address false statements to law enforcement agencies. Congress' inaction, despite its awareness of the holding in the *Friedman* case, tends to confirm the correctness of the Eighth Circuit's approach to the statute.

3. Even if it is assumed that the legislative history of § 1001 evidences no positive congressional intent to limit the statute's application to regulatory agencies or departments, it is encumbent upon the petitioner, the party proposing a broad interpretation of an ambiguous penal statute, to point to language that is clear and definite in support of the harsher

alternative. *United States* v. *Bass*, 404 U.S. 336, 347 (1971). Instead, the legislative history indicates, at best, congressional unawareness of the issue. This lack of debate is crucial; for as this Court has recently noted, "a legislative history that fails to evidence congressional awareness of the statute's claimed scope" is a factor that must be weighed againt reading an ambiguously worded penal statute broadly. *Williams* v. *United States*, 458 U.S. 278 (1982).

I.D.

1. Additional policy concerns support the result reached in *Friedman*. *Friedman* promotes an open line of communication between the public and law enforcement departments. Because sources of police information often come from individuals already suspicious of the criminal justice system, it is unrealistic to assume that voluntary prosecutorial restraint will prevent the disappearance of some vital information. Ironically, adoption of petitioner's reading of § 1001 will encourage, rather than deter, overall criminal activity.

2. The *Friedman* rule also guarantees that individuals who have valid civil rights complaints against law enforcement officials will not be deterred from pursuing those rights out of fear of harassment or revenge.

3. In addition, the *Friedman* approach has the advantage of harmonizing the so-called "exculpatory-no" problem. Since, under *Friedman*, virtually any statement given to an investigatory agency in the course of an investigation is not subject to the statute, the difficult issues involved in a typical "exculpatory-no" situation are avoided.

4. Finally, several courts have recently become concerned that unless § 1001 is limited to written or recorded statements, defendants charged under that statute would be unable to avail themselves of the technical defense provided in *Bronston* v. *United States*, 409 U.S. 352 (1973). While it is as yet unclear whether a *Bronston* defense is applicable in a § 1001 context, requiring an accused to construct a defense based only on the

sketchy notes of an agent is disturbing. The *Friedman* rule, by excluding all statements to investigative agencies, avoids this problem, at least in the context of investigative inquiries.

II.

If this Court should impose a new rule in the Eighth Circuit and declare that *Friedman* and *Rodgers* were wrongly decided, due process would prohibit the retrospective application of this new rule to this respondent.

A judicial enlargement of an existing criminal statute operates precisely like a legislative enactment of a new penal law. Congress is prohibited by the *ex post facto* ban to retroactively apply new laws to old conduct. Similarly, the Due Process Clause bars the judiciary from declaring illegal, activity which was legal when done. As this Court held in *Bouie* v. *city of Columbia*, 378 U.S. 347 (1964), "the fundamental principle that "the required criminal law must have existed when the conduct in issue occurred,' . . . must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislature." *Id.* at 354, quoting, Hall, *General Principles of Criminal Law* (2d ed. 1960), at 58-59.

Adoption of petitioner's broad view of § 1001 would represent a wide departure from current Eighth Circuit law. This is particularly so in view of the length of time during which the *Friedman* rule has been in effect and in view of the general applicability that the *Friedman* holding was intended to have. Consequently, subjecting respondent's past behavior to a radically new standard of criminal conduct announced long after the act was completed is a retroactive application of a criminal law that is in clear violation of the Due Process Clause, U.S. Constitution, Amendment V.

ARGUMENT

I. ORAL, UNSWORN COMPLAINTS GIVEN TO INVESTIGATORY AGENCIES ARE NOT SUBJECT TO CRIMINAL PROSECUTION UNDER 18 U.S.C. § 1001

In *Friedman* v. *United States*, 374 F.2d 363 (8th Cir. 1967), a panel of the Eighth Circuit examined the meaning of the term "jurisdiction" as used in 18 U.S.C. § 1001. In construing that word, that Court recognized a "clear distinction between the power to investigate and the . . . authority to decide and act upon a particular subject matter." *Friedman* v. *United States*, *supra*, at 367. Because the Eighth Circuit was understandably reluctant to accept a sweeping interpretation of the statute that could subject to severe criminal punishment anything more than "a casual social conversation with a government employee. . ." (*Id.* at 366), the Court defined "jurisdiction" as "the power to dispose of the problems or compel action" (*Id.* at 367), thereby excluding from coverage of the act investigative agencies such as the Federal Bureau of Investigation and the Secret Service. This concept of "jurisdiction" was reaffirmed by a unanimous panel in the present case. *United States* v. *Rodgers*, 706 F.2d 854 (8th Cir.), *cert. granted*, ___ U.S. ___, No. 83-620 (Dec. 5, 1983).

The petitioner now argues that the plain, ordinary meaning of the word "jurisdiction" implies much more than the "power to adjudicate rights, establish binding regulations, compel the action or finally dispose of the problem. . . ." *Friedman* v. *United States*, *supra*, at 368. Rather, petitioner states " 'jurisdiction' denotes simply the 'power or right to exercise authority. . . ." Brief for the United States, p. 12, quoting, *Webster's Third New International Dictionary* 1227 (1967). The difficulty with petitioner's assertion, however, is that there is simply no convincing authority for the proposition that the Eight Circuit's definition of "jurisdiction" is unique or

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[1] Following the decision in *Rodgers*, affirming the district court's dismissal of the present Indictment, the Government filed a Petition for Rehearing *en banc*, which was denied by the full Court on July 25, 1983. (Pet. App. 8a)

unusual and the petitioner's proposed meaning is the only commonly accepted one.

Certainly, the legislative history of § 1001 offers no support for an unfettered reading of the word "jurisdiction." In fact, as will be demonstrated below (pp. 31 to 38, *infra*), the legislative reports and debates pertaining to the passage of this language reveal that the reach claimed by the petitioner for the statute was never intended by Congress.

Moreover, the overly broad gloss favored by the petitioner not only does violence to two well-recognized rules of statutory construction, but would unleash a set of social and legal problems which may be difficult or impossible to resolve.

A. THE EIGHTH CIRCUIT ACCORDED THE TERM "JURISDICTION" A REASONABLY BROAD, NON-TECHNICAL DEFINITION CONSONANT WITH A COMMON UNDERSTANDING OF THE MEANING OF THAT WORD

Petitioner bases his argument on two rules of statutory construction: (1) in the absence of ambiguity and legislative intent to the contrary, statutory language " 'must ordinarily be regarded as conclusive.' " *Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), Slip Op. 4, quoting *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). See, Brief for the United States, p. 11; and (2) " 'legislative purpose is expressed by the ordinary meaning of the words used.' " *Russello* v. *United States*, *supra*, Slip Op. 4, quoting *Richards* v. *United States*, 369 U.S. 1, 9 (1962). See, Brief for the United States, p. 12. These general rules of construction can indeed be helpful if properly applied. Petitioner, however, while correctly stating the law, fails to accurately analyze its application to the facts in this case. The fatal flaw in petitioner's argument is his unstated assumption that the definition of "jurisdiction" adopted by the *Friedman* Court is not an ordinary or common meaning of that word simply because it does not encompass an entire range of meanings. Respondent is not aware of, nor does petitioner cite to, any authority that equates most common use of a term with the

broadest possible definition of that term. As will be demonstrated below, the definition of "jurisdiction" used by the Eighth Circuit fits well within a common understanding of that word. There is no reason to conclude that the hazy, overbroad definition proposed by the petitioner is any more ordinary in its meaning than that employed by the *Friedman* Court.

"Jurisdiction," which in the Latin means literally, "I speak by the law," has been variously defined, but often "implies a court or tribunal with judicial power to hear and determine a cause. . . ." 50 C.J.S. *Jurisdiction* 1090 (1947). The term "expresses the concept of legal power to interpret and administer the law. . ." (*Id.*) and "has been generally defined . . . in connection with individuals or bodies which are not a part of the judiciary . . ., as the power to hear and determine a cause . . ., the . . . capacity . . . to entertain, hear and determine certain controversies; [or] the power to inquire into facts and apply the law. . . . *Id.* at 1091. This Court, while never having occasion to define the word in a § 1001 context, has recognized that in its "popular sense" jurisdiction means the "authority to apply the law to the acts of men." *Wedding* v. *Meyler*, 192 U.S. 573, 584 (1903).

A single, correct meaning for the word "jurisdiction" does not appear to be readily avialable, yet there is a sense inherent in many of the definitions that "jurisdiction" involves, if nothing else, the power to "hear and determine issues. . . ." 50 C.J.S. *Jurisdiction* 1091 (1947). The definition adopted by the Court in *Friedman* is, in this regard, squarely within the generally understood meaning of the term; for the Eighth Circuit's decision merely defines "jurisdiction" in terms of an agency's power or authority to finally dispose of a matter. *Friedman* v. *United States*, *supra*, at 369. As one commentator has put it, the Court decided in *Friedman* that "an agency has 'jurisdiction' only when it has dispositive regulatory power over the matter in issue." Note, *Criminal Liability for False Statements to Federal Law Enforcement Officials*, 63 Va. L. Rev. 451, 457 (1977). There is no significant distinction between *Friedman's* "dispositive regulatory power over the

matter" and the generally accpeted notion that "jurisdiction" involves "the capacity . . . to entertain, hear and determine certain controversies." 50 C.J.S. *Jurisdiction* 1090 (1947). Far from being the "cramped" or "technical" definition described by the petitioner the Court's view of the word "jurisdiction" is entirely consistent with an ordinary understanding of that term.

Nor does petitioner's reference to *Webster's Dictionary* lend support to his position. Brief for the United States, p. 12. While it is true that one definition of "jurisdiction" is given as "power or right to exercise authority," it is far from clear what is meant by the key term, "authority." The word "authority" is defined elsewhere by *Webster's* as the "power to . . . receive submission"; or "superiority derived from a status that carries with it the right to command and give final decisions" or the "power to influence thought and opinion." *Webster's Third New International Dictionary* [Unabridged] 146 (1966). It is not easy to see how "jurisdiction" as an "authority" so defined relates in any meaningful way to the purely investigative functions of an agency, despite petitioner's unstated assumption that it does.

Moreover, petitioner is compelled to admit that *Webster's* first defines "jurisdiction" in another way, as " 'the legal power . . . to hear and determine a cause . . .' legal power to interpret and administer the law in the premises.' " Brief for the United States, pp. 12-13, n. 3. Even though this definition is similar to the interpretation placed upon the statute by the *Friedman* Court, petitioner dismisses it as not representative of ordinary usage. Brief for the United States, pp. 12-13, n. 3. The explanatory notes in *Webster's* make clear, however, that in cases where a meaning is no longer in standard use, the status labels "obs," for "obsolete" or "archaic" will be shown before the definition. *Webster's Third New International Dictionary* [Unabridged] 18a-19a (1966). Significantly, no such usage qualifier appears before the first meaning given for "jurisdiction." While it is true that the order of sense is listed historically in *Webster's*, there is simply nothing from which to

conclude, as petitioner apparently has, that an older meaning cannot also be in ordinary usage today. Certainly, there is nothing out of date in a concept of "jurisdiction" that involves in some way the power to finally dispose of a matter.

It may be true, as the petitioner states, that no dictionary defines jurisdiction "solely" in terms of the power to dispose of issues (Brief for the United States, p. 14); nevertheless, that is a commonly understood attribute of "jurisdiction," and there is no rule of construction that compels the conclusion that all possible usage of a word must be employed in a penal statute.

It is certainly not true, however, despite petitioner's assertions to the contrary (Brief for the United States, p. 14, n. 4), that only *Gonzales* v. *United States*, 286 F.2d 118 (19th Cir. 1960), *cert. denied*, 365 U.S. 878 (1961), provides case authority for the Friedman view of the term "jurisdiction." Rather, the Friedman Court had ample precedent to support its construction of the statute. In *United States* v. *Stark*, 131 F.Supp. 190 (D. Md. 1955), for example, that Court in holding that denials given to F.B.I. agents, even if made under oath, are "not within the jurisdiction of the F.B.I. or the Department of Justice . . ." (*Id.* at 207), recognized the crucial "distinction between the power to investigate and the jurisdiction or authority to decide and act upon a particular subject matter." *Id.* at 206-207. Similarly, the Court in *United States* v. *Davey*, 155 F.Supp. 175 (S.C. N.Y. 1957), ruled, at least in part, that the investigative function of the F.B.I. does not constitute jurisdiction for purposes of the act. *Id.* at 177.[2] Clearly, there is more than *Gonzales* to support the *Friedman* Court's in-

[2] Similarly, in *United States* v. *Levin*, 133 F.Supp. 88 (D. Colo. 1953), the defendant was charged under § 1001 with having made false statements to agents of the Federal Bureau of Investigation. That Court, after a lengthy discussion of the history and purpose of the statute, limited its application "to persons under legal obligation to speak or to give information to representatives of an agency or department of the United States *who have authority to finally dispose of the matter being investigated* . . ." *Id.* at 90-91 (emphasis added).

terpretation of "jurisdiction" within § 1001.[3] Consequently, the Eighth Circuit's view of "jurisdiction" is not, as petitioner seems to imply, unique or unusual, but in fact follows a line of relevant case law which recognizes and gives effect to a commonly understood meaning of the word "jurisdiction."

Nor did the *Friedman* Court take a unique position in holding that § 1001 "must have some effective limits." *Id.* at 367. Federal courts have repeatedly refused to apply the statute in a literal manner. For example, despite the apparently all inclusive wording of the statute, at least one court has refused to apply § 1001 to the introduction of false documents in a criminal proceeding. *United States* v. *Erhardt*, 381 F.2d 173 (6th Cir. 1967). Another court has found the prohibitions of § 1001 inapplicable to preliminary inquiries by an agency to determine jurisdiction under the Fair Labor Standards Act. *United States* v. *Moore*, 185 F.2d 92 (5th Cir. 1950). A third court held that false statements to a grand jury are not false statements within the meaning of the statute. *United States* v. *Allen*, 193 F.Supp. 954 (1961). The Eighth Circuit has refused to extend coverage of the law to false statements on loan applications, even though some governmental involvement was present. *Terry* v. *United States*, 131 F.2d 40 (8th Cir. 1942). False

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[3] The *Gonzales* Court defined "jurisdiction" in the context of § 1001 as "the right to say and the power to act. . . ." *Id.* at 123. The Eighth Circuit did not misunderstand or misapply this definition in *Friedman*, as petitioner contends. Brief for the United States, pp. 14-16, n. 4. The F.B.I. or Secret Service may investigate possible criminal events, but they may not "decide whether a criminal offense has been committed." *Friedman* v. *United States*, *supra*, at 368 Unlike the R.E.A., the lending agency involved in *Gonzales*, the F.B.I. or Secret Service, in pursuing their investigative functions, do not have "the power to [finally] act on the information submitted." *Gonzales* v. *United States*, supra, at 123. Whereas the R.E.A. could conceivably withhold the granting of a governmental privilege, a loan, the F.B.I. or Secret Service has no equivalent authority. This sense of "power to act" is clearly what the Court in *Gonzales* mean to convey in further defining agency jurisdiction to include "the power . . . to administer and enforce the law," and it is precisely this power that investigatory agencies such as the F.B.I. or Secret Service lack.

statements in a civil suit in Federal Court were held by the Second Circuit not to be within the ambit of the law. *United States* v. *D'Amato*, 507 F.2d 26 (2d Cir. 1974).[4] And sevral courts have ruled that a suspect in a criminal investigation may not be charged with a violation of § 1001 simply because he falsely denies incriminating information, the so-called "exculpatory-no" doctrine. See *United States* v. *Chevoor*, 526 F.2d 178 (1st Cir 1975), *cert. denied*, 426 U.S. 935 (1976), and cases cited therein at 183, n. 9 and 10.

While the specific rationale for refusing to extend coverage of the statute in a particular factual setting may not always be clear or consistent, it is certain that judicial restraint in applying the false statement prohibition has been common. The *Friedman* decision falls squarely within this tradition of restraint.

The Second and the Fifth Circuits have concluded that § 1001 does extend to false statements provided investigatory agencies. It is respectfully suggested that those decisions are incorrect and should not be followed.

United States v. *Adler*, 380 F.2d 917 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967), is unpersuasive because it lacks a detailed analysis of the legislative history undertaken by the Eighth Circuit in *Friedman*. Additionally, the *Adler* decision is devoid of the kind of careful consideration of policy ramifications so evident in the *Freidman* opinion. Instead, the *Adler* Court relies very heavily on *Bryson* v. *United States*, 396 U.S. 64 (1964). The Second Circuit's dependence on *Bryson*, however, is misplaced, since the factual setting in Bryson differs considerably from that involved in the instant case. See discussion of *Bryson*, pp. 20 to 21, *infra*.

United States v. *Massey*, 550 F.2d 300 (5th Cir. 1977), is factually similar to the case at bar, but that Court did not base its affirmance of a conviction under § 1001 on an independent

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[4] A similar result was reached in *United States* v. *London*, 714 F.2d 1558 (11th Cir. 1983).

analysis of the statute; rather, the Court relied almost entirely on prior precedent in the Fifth Circuit, specifically on *United States* v. *Lambert*, 501 F.2d 943 (5th Cir. 1974), *United States* v. *Massey*, *supra*, at 305. But the authority of *United States* v. *Lambert*, *supra*, is somewhat diminished by the vigorous dissent filed by seven Judges. Those seven Judges did not disagree with the majority's reversal of the defendant's conviction; in fact, they occurred with the result. The dissent wrote to stress the importance "of preserving an open line of communication between private citizens and law enforcement agencies." *Id.* at 952. The dissent recognized that such a signficant national policy can only be impaired by a literal interpretation of § 1001, a position which the Court in *Friedman* adopted and this Court should continue to support. See discussion of this policy concern, pp. 42 to 43, *infra*.

In a further attempt to bolster his argument, petitioner refers this Court to three prior decisions involving § 1001: *United States* v. *Gilliland*, 312 U.S. 86 (1941); *United States* v. *Bramblett*, 348 U.S. 503 (1955); and *Bryson* v. *United States*, 396 U.S. 64 (1969). These cases, however, do not support the petitioner's position that the broadest possible definition for the term "jurisdiction" must be employed. In none of these cases was the Court confronted with an attempt to apply § 1001 to an investigatory agency.

In *United States* v. *Gilliland*, *supra*, this Court merely held that presenting false information about petroleum production to the Department of the Interior falls squarely within the purview of the amended predecessor statute to § 1001. This Court, of course, had ample reason to so hold, since the statute was amended primarily to curb precisely the kind of misrepresentations alleged to have been made by the defendants in that case.[5] The *Gilliland* Court simply gave effect to the intended purpose of the 1934 amendments, to eliminate any "restriction to cases involving pecuniary or property loss to the

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[5] See discussion of the legislative history of § 1001, *infra*, pp. 31 to 38.

government." *Id.* at 93. Nothing in that decision bears upon whether a statute, held to apply to a "hot oil" situation, one of the evils Congress expressly inteded to reach, should be stretched to extend to oral statements made to investigatory agencies such as the F.B.I. or the Secret Service.

To be sure, this Court in *dicta* did indicate that the law was intended to "protect the authorized functions of governmental . . . agencies from the perversion which might result from the deceptive practices described." *Id.* at 93. That statement, however, was made in the context of a discussion as to whether the statute's provisions ought to be limited to the enforcement of the National Industrial Recovery Act. *Id.* at 95-95. This Court, in holding that the protections provided by the false statement statute could be extended to any law under which "the presentation of affidavits, documents . . . is required" (*Id.* at 96), in no way intimated that unsworn oral statements to the F.B.I. would be embraced by the newly amended law.

Nor is it as clear as petitioner asserts that misstatements to investigatory agencies result in the kind of perversion of agency functions that was envisioned by the *Gilliland* Court. The untruths involved in *Gilliland* clearly prevented the Department of the Interior from doing its job; namely, prohibiting the interstate transportation of contraband oil. The same cannot be said for misinformation supplied to the F.B.I. or Secret Service; for while "the giving of false information might have the effect of causing needless investigation, it does not pervert the agency's functions as envisioned by the purposes of the statute. The F.B.I. was only empowered to investigate the claim. This mere investigation of the claim caused no real corruption of its authorized activities." *Friedman* v. *United States*, *supra*, at 366.

United States v. *Bramblett*, supra, also relied on by the petitioner, was no concerned with establishing the boundaries of "jurisdiction"; rather, this Court in that case was confronted with the question of whether the provisions of § 1001 should be limited to executive departments of the Government. *Id.* at

509. No consideration of the statute's applicability to investigatory agencies was undertaken. Consequently, it is unjustified to view the *Bramblett* case as authoritative precedent for an unfetterd construction of the term "jurisdiction." This is especially true since that case involved the kind of pecuniary fraud upon the Government traditionally at the heart of the false statement law. To the extent that the *Bramblett* decision may be read to mean that § 1001 should be construed in a reasonably broad, common-sense manner, the Eighth Circuit's decision in Friedman is not in conflict, for as discussed above (pp. 10 to 14, *supra*), the definition of "jurisdiction" employed by the *Friedman* Court falls squarely within a commonly understood definition of that term.

Finally, the petitioner cites *Bryson* v. *United States*, *supra*, for the proposition that "the term 'jurisdiction' should not be given a narrow or technical meaning for purposes of § 1001." Brief for the United States, p. 21. The *Friedman* definition of "jurisdiction," however, is not "narrow" or "technical," but represents a well recognized, reasonably broad view of that word. The *Friedman* decision is not therefore inconsistent with this Court's holding in *Bryson*.

Moreover, the factual setting in *Bryson* differs considerably from that involved in the present case. In *Bryson*, the false statements were not given to a criminal investigatory agency. Instead, the National Labor Relations Board was the victim of the falsehood, an agency which has the power to adjudicate rights and establish binding regulations and which, even under the *Friedman* ratonale, would be subject to the protections of the statute. *United States* v. *Rodgers*, *supra*, at 856.

Additionally, since no criminal investigative department was implicated in *Bryson*, this Court had no occasion to consider the broad social policies protected by the *Friedman* ruling.[6] In fact, this Court expressly refused to "either . . .

[6] For a discussion of some of these policies, see *infra* pp. 42-46.

approve or disapprove *Friedman's* holding." *United States* v. *Bryson*, *supra*, at 71, n. 10.

The petitioner argues that, since an investigative function of the N.L.R.B. may have been affected by the submission of the false affidavit, *Bryson* is in reality good authority for the proposition that *Friedman* and *Rodgers* were incorrectly decided. Brief for the United States, pp. 21-22. The investogatory power of the N.L.R.B., however, does not comprise its sole or even primary function. That power is merely the means by which the agency can determine whether to grant further rights and remedies such as a hearing, an election and a certification thereof. 29 U.S.C. § 159(c)(1).[7] The N.L.R.B., unlike criminal investigatory agencies, retains the power "to adjudicate rights . . . compel the action or finally dispose of the problem giving rise to the inquiry." *Friedman* v. *United States*, *supra*, at 368. Any investigatory function given to the N.L.R.B. is merely ancillary to its broader authority to "finally dispose of the problem." *Id.*

In the final analysis, the definition accorded by the *Friedman* Court to the term "jurisdiction" is not unusually restrictive. Rather, the Eighth Circuit adopted a reasonably broad common-sense view that reflects a widely understood concept of the term. Consequently, the holding in *Friedman*, far from being inconsistent with existing case law, fits within the mainstream of authority recognizing the necessity for the imposition of reasonable limits on § 1001.

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[7] 29 U.S.C. § 159(c)(1) provides in relevant part:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board • • • the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

B. EVEN IF THE TERM "JURISDICTION" MAY, IN NORMAL USAGE, IMPLY A BROADER CONCEPT THAN THAT ACCORDED BY *FRIEDMAN*, IN THE CONTEXT OF 18 U.S.C. § 1001, THE INTERPRETATION ADOPTED BY *FRIEDMAN* IS CORRECT

1. The Rule Of Lenity Mandates Rejection Of Petitioner's Expansive Reading Of The Statute

The petitioner, in arguing that the broadest possible meaning be attached to the term "jurisdiction" in § 1001, runs afoul of "an ancient rule of statutory construction and an oft-repeated one that penal statutes should be strictly construed against the government . . . and in favor of persons on whom such penalties are sought to be imposed." 3 C. Sands, *Sutherland Statutory Construction*, § 59.03, pp. 6-7 (4th ed. 1974). This Court has remarked that " 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' " *United States* v. *Bass*, 404 U.S. 336, 347 (1971), quoting *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952). See also, *Ladner* v. *United States*, 358 U.S. 169, 177-8 (1958); and *Whalen* v. *States*, 445 U.S. 684, 596 (1980). This rule of lenity is particularly applicable to the case at bar.

First, the key term, "jurisdiction" is not easily susceptible to a single clear and definite meaning. In fact, petitioner concedes as much. Brief for the United States, p. 14. The ambiguity inherent in the word "jurisdiction" renders petitioner's reliance on *Russello* v. *United States*, *supra*, and similar cases misplaced (Brief for the United States, pp. 11-12); for the rule of construction announced in those cases depends upon statutory language that is "unambiguous." Brief for the United States, p. 11.

Second, as will be discussed below,[8] legislative history reveals that Congress, in enacting the statutory language at

[8] See pp. 32 to 38, *infra*.

issue here, did not speak "in language that is clear and definite." *United States* v. *Bass*, *supra*; *Ladner* v. *United States*, *supra*, at 177-178. Consequently, without some showing that Congress intended to reach the conduct involved here, this Court must hesitate before adopting the wide-open interpretation proposed by the petitioner. As this Court has recently noted, one factor that must be considered in determining the reach of a criminal statute is whether the "legislative history . . . fails to evidence congressional awareness of the statute's claimed scope. . . ." *Williams* v. *United States*, 458 U.S. 279, 290 (1982).

Third, the underlying reasons for the rule of lenity have particular application here. One justification for the rule is to insure that all persons are given fair warning as to what behavior will subject them to punishment. C. Sands, *supra*, § 59.03 at 7. In the present case, not only are the words of the statute unclear, but the defendant, in making only oral, unsworn statements on the telephone had no occasion to be put on notice that what he was doing could subject him to imprisonment for up to five years.[9]

Another reason for strict construction is "to protect the individual against arbitrary discretion by offiials and judges." C. Sands, *supra*, § 59.03 at 8. Adoption of petitioner's dangerously expansive view of the statute would subject not only individuals like Rodgers to severe punishment, but also those who falsely deny their guilt or those, like Mr. Friedman, who complain about police mistreatment. In fact, as the *Friedman* Court noted, "anything more than a casual social conversation with a government employee would, without warning, subject the speaker to the possibility of severe criminal punishment." *Friedman* v. *United States*, *supra*, at 366. It is

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[9] A review of the "Stipulation of Facts in Connection with Defendant's Pretrial Motion to Dismiss Indictment," filed December 8, 1982, and the transcript of the proceedings taken on December 3, 1982, filed January 7, 1983 do not show that the defendant was at any time warned about possible criminal liability in making false statements to the agency.

not enough to say, as the petitioner does, that the Department of Justice, "as a matter of prosecutive policy" does not pursue certain types of cases (Brief for the United States, p. 11, n. 2); for there can be no assurance that such a policy will not change. In the absence of a reasonable construction of § 1001 pursuant to the well recognized rule of lenity, there is no judicial protection for the individual who may be a victim of prosecutorial bad judgment or harassment.

It is true, of course, that the "rule of strict construction does not require that penal statutes be given the 'narrowest meaning' that the words of the statute ill allow" (C. Sands, *supra*, § 59.06 at 18), nor is respondent seeking such a construction. Rather, respondent urges that to interpret the term "jurisdiction" in the context of § 1001 in the broadest possible manner as the petitioner suggests is inapproprate in view of the ambiguity of the language, the uncertainty of the legislative history, and the strong applicability to this criminal statute of the rule of lenity.

2. Petitioner's Proposed Construction Would Produce Absurd And Unjust Results.

In addition to the requirement of strict construction in penal matters, there is another rule of statutory construction which militates against acceptance of petitioner's uncompromisingly literal interpretation of § 1001. As this Court has noted, "To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is . . . a traditional and appropriate function of the courts. . . ." *Sorrells* v. *United States*, 287 U.S. 436, 450 (1932). Adoption of petitioner's overly broad concept of "jurisdiction" would have unfortunate results.

First, should this statute be construed to embrace unsworn, oral statements made to investigative agencies, it would be tantamount to declaring that "Congress considered it more serious for one to informally volunteer an untrue statement to an F.B.I. agent than to relate the same story under oath before

a court of law." *Friedman* v. *United States*, *supra*, at 366. This is so because at the time of its enactment, the predecessor statute to § 1001 provided for a punishment that was more severe than that provided by the general perjury law.[10] It is not an adequate answer to this legitimate concern to say that the "matter of penaltes lay within the discretion of Congress." *United States* v. *Gilliland*, *supra*, at 95; Brief for the United States, p. 32. While this statement is undoubtedly correct as far as it goes, such disparity in penalties may not only produce absurd results, but also provide some indication of legislative intent. It is difficult to conceive that Congress wanted to punish spontaneous oral statements to the F.B.I. as or more severely than carefully rehearsed testimony under oath in a court of law. Such a construction is especially difficult to accept in the absence of clear legislative intent authorizing it.[11]

While it may be correct to say that misstatements to the F.B.I. can have serious consequences (Brief for the United States, pp. 33-34), it is to strain the point beyond all measure to maintain that perjury in a court of law is not a greater misdeed. After all, a witness at a trial is placed under oath and given fair warning of the consequences of a lie. Moreover, thee results of perjury are not simply a fruitless investigation conducted by an agency designed to investigate claims, but may be the irreparable loss of a persons's property, freedom, or even life. It is absurd to assume that Congress could have viewed an informal, unsworn fiction more seriously than perjured testimony in a court of law.

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[10] 18 U.S.C. § 1621, the general perjury statute, provides a penalty of not more than five years' imprisonment and a $2,000 fine, whereas, 18 U.S.C. § 1001 presently provides for a period of imprisonment not to exceed five years and a $10,000 fine. Significantly, in 1934, when Congress enacted the language at issue in this case, the false statement statute allowed incarceration for up to ten years, as well as a $10,000 fine. 48 Stat. 997. The maximum period of imprisonment was subsequently reduced to five years in 1948. 18 U.S.C. § 287, 18 U.S.C. § 1001.

[11] See *infra* pp. 32 to 38.

But petitioner argues that since the *Friedman* construction fails to alleviate all possible sentencing anomalies, it must be discarded as ineffectual. Brief for the United States, p. 33. The short answer to this contention is that while the Friedmen approach may not be a panacea, nevertheless, its commonsense interpretation of § 1001 avoids serious incongruities in the law. A logical solution to a thorny problem ought not to be ignored simply because it does not address every possible difficulty that may arise. Moreover, the various false statement provisions cited by petitioner (Brief for the United States, p. 33) illustrate that Congress does not hesitate to provide smaller penalties for less serious instances of false statements. Brief for the United States, p. 33, n. 16. If Congress had intended to reach similar kinds of false statements to the F.B.I. or Secret Service, then surely it would have provided a penalty range commensurate with that offense. Congress' failure to do so is an indication of its lack of intent to reach this kind of conduct.

Acceptance of petitioner's unreasonable broad view of § 1001 would hav undesirable consequences in another way. Numerous statutes authorize officials of various departments and agencies to administer oaths to those from whom information is sought.[12] An overbroad interpretation of § 1001 would render many of those provisions superfluous. If an oral statement to an investigative officer is held to fall within the "jurisdiction" of an agency for purposes of § 1001, there would be little incentive to take the trouble of placing a subject under oath. *Friedman* v. *United States*, *supra*, at 367. The fact that oaths may "serve an important function in reminding individuals of their obligation to tell the truth and in serving notice that false statements could subject them to criminal prosecution" (Brief for the United States, p. 36) merely underscores the need to avoid giving § 1001 the kind of effect that

[12] For a list of some of these statutes, see *United States* v. *Levin*, 133 F.Supp. 88, 90 (D. Colo. 1953).

would tend to eliminate or at least reduce the instances in which an oath is routinely administered.

This is particular concern with respect to the F.B.I. and Secret Service. The present authority of those bureaus to administer oaths in investigations involving fraud against the United States or misconduct of a governmental employee (see 5 U.S.C. § 303) would be seriously compromised by an overly literal interpretation of § 1001. Petitioner asserts that this overlap need not concern this Court since such authority to administer oaths is not immediately implicated in this case. Brief for the United States, p. 36. Petitioner, however, offers no explanation as to how this broad view of "jurisdiction" can be distinguished so that it does not also become applicable to those occasions on which an oath is permitted to be given. If it is held that statements to an investigative agency fall within the purview of the statute, there is nothing to prevent a prosecutor from bringing an indictment under § 1001 even in instances where an oath could have been administered but was not. In fact since the punishment provided under § 1001 is somewhat greater than that allowed by the general perjury statute,[13] there may be a disincentive to administer the oath in precisely those situations which Congress felt is especially important to do so.

A third area of concern involves the effect upon the judiciary of an expansive view of § 1001. As noted by the *Friedman* Court, "[s]ince the judiciary is an agency of the United States Government, a strict application of this statute would remove the time-honored and now necessary formality of requiring witnesses to testify under oath." *Id.* at 367. Petition responds to what he considers the Court's "makeweight" concern by noting that some jurisdictions have restrictively interpreted the term " 'department or agency' " to generally exclude the federal judiciary from coverage. Brief for the United States, p. 37. It is interesting to note that the petitioner finds it necessary

[13] See p. 26, n.10, *supra*.

at last to abandon his crusade for an absolutely literal interpretaion of § 1001 and to stand with those authorities that advocate a less than expansive approach to the statute. Certainly, it is difficult to reconcile petitioner's narrow interpretation of the words "department or agency" with his overly generous view of the word "jurisdiction," especially since he earlier cites *United States* v. *Bramblett*, *supra*—a case concerned with the definition of "agency"—for the proposition that "the Court's broad construction of the statute strongly suggests that *all* governmental agencies, regardless of the *nature* of the function they are authorized to perform, are covered by the statute." Brief for the United States, p. 20. (Petitioner's emphasis). Suffice it to say that petitioner fails to explain why it is necessary to broadly construe one section of the statute and narrowly construe another section of that same statute. Such inconsistency only lends weight to the proposition that a doctrinaire or overly literal approach to the statute can be disastrous.

The possibility that the oath requirement in a court of law may be compromised by an aggressively liberal construction of § 1001 is especially disturbing in view of the procedural safeguards provided a defendant under the perjury statutes but not under the false statement law. For instance, since no oath is required by § 1001, a defendant charged under that statute is given no advance warning that what he says may subject him to felony prosecution. In addition, a defendant cannot be convicted for perjury on the basis of the testimony of a single witness. This so-called two-witness rule requires the testimony of at least two witnesses or a single witness corroborated by additional evidence before a perjury conviction can be secured. *Weiler* v. *United States*, 323 U.S. 606, 609-610 (1945). This requirement is not, however generally applicable under § 1001. See *United States* v. *Erhardt*, 381 F.2d 173, 175 (6th Cir. 1967); *United States* v. *Killian*, 246 F.2d 77, 82 (7th Cir. 1957). More recently, in *Bronston* v. *United States*, 409 U.S. 352 (1972), this Court further restricted the scope of the perjury statute by holding that an incomplete, misleading or decep-

tive statement, if literally true, does not constitute perjury. If such a limitation is not applicable in a § 1001 context, then a broad reading of that statute would invite avoidance of the requirements announced by this Court not only in *Weiler*, but in *Bronston* as well.[14] As a result, to adopt at this time the overexpansive view of § 1001 promulgated by petitioner is, as the Eighth Circuit stated in *Friedman*, to bring "about absurd consequences . . . not intended by Congress." *Friedman* v. *United States*, *supra*, at 367, quoting *Sorells* v. *United States*, *supra*, at 446.

C. THE LEGISLATIVE HISTORY CONTAINS NO SUPPORT FOR PETITIONER'S OVERLY EXPANSIVE INTERPRETATION OF § 1001

In view of the ambiguity of the key term "jurisdiction" and the penal nature of the statute involved, the legislative history of § 1001 becomes crucial in determinig whether Congress intended the wide scope claimed for the statue. As this Court has warned, Congress must speak in "language that is clear and definite" before the harsher alternative in a criminal statute is chosen. *United States* v. *Bass*, *supra*, at 347, quoting *United States* v. *Universal C.I.T. Credit Corp.*, *supra*, at 221-222. This admonition takes on added significance when the construction sought to be imposed on the statute leads to "absurd or glaringly unjust results, foreign to the legislative purpose. . . ." *Sorrells* v. *United States*, *supra*, at 450. Petitioner, then, is incorrect in assuming that the Eighth Circuit had some obligation to buttress its reasonable interpretation of § 1001 with support from the legislative background. Brief for the United States, p. 23. Rather, it is the party urging the Court to adopt the harsher alternative in an ambiguously worded criminal statute who bears the responsibility for pointing out evidence of such congressional intent. *United States* v. *Bass*, *supra*; *Ladner* v. *United States*, *supra*; *Williams* v.

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[14] If, on the other hand, the *Bronston* ruling is applicable in a § 1001 context, then other problems arise. For discussion, see *infra* pp. 45 to 46.

United States, *supra*. A review of the legislative history of the false statement statute reveals nothing that would support an attempt to reach unsworn, oral statements given to investigatory agencies. In fact, such a review reveals that at best Congress had no intention of addressing this problem at all.

1. **The *Friedman* Holding Comports With Legislative Intent As Revealed In The Congressional Reports And Debates.**

An extensive re-examination of the congressional history of this statute need not be undertaken here, since this has been thoroughly done by this Court as well as by others on several different occasions. *See*, for example, *United States* v. *Goldfine*, 538 F.2d 815, 823-25 (9th Cir. 1976) (Ferguson, J., dissenting); *United States* v. *Bramblett*, *supra*, at 504-9; *United States* v. *Gilliland*, *supra*, at 91-05; *United States* v. *Stark*, 131 F.Supp. 190, 199-202 (D. Md. 1955); *Friedman* v. *United States*, *supra*, at 366. Nevertheless, certain aspects of that history are particularly relevant to the present issue.

Prior to 1934, the false statement statute reached only pecuniary frauds perpetrated against the United States.[15] In 1934, however, Congress felt it necessary to broaden the scope of this statute so as to provide a punishment for non-monetary frauds. Such frauds were threatening the integrity of certain regulatory agencies created to help the country cope with the economic disaster of the depression. It was at this time that the phrase "within the jurisdiction . . ." was introduced into the statute.

Throughout the legislative history it is made clear that the purpose for the new legislation was, as the Court in *Friedman* noted, to "curtail the flow of false information to the newly

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[15] The predecessor to 18 U.S.C. § 1001, Act of October 23, 1918, Ch. 194, § 35, 40 Stat. 1015 (1918), was construed in *United States* v. *Cohn*, 270 U.S. 320, 346-47 (1926) "as relating to the fraudulent causing of pecuniary or property loss."

created regulative agencies" formed in the wake of the great depression. *Friedman* v. *United States*, *supra*, at 366. For example, the Senate version of the amendment, S. 2686, 73d Cong., 2d Sess. (1934), 78 Cong. Rec. 2152 (1934), was prompted by a letter from the Secretary of the Interior to Senator Ashurst. The Secretary complained about the difficulty of enforcing certain "new deal" programs such as the N.I.R.A. and the P.W.A., as well as promoting fair competition within the petroleum industry in the absence of legislation prohibiting the "presentation of false papers" in these areas. 78 Cong. Rec. 2152 (1934). Significantly, the Committee on the Judiciary, in reporting S. 2686, *supra*, favorably to the full Senate, quoted this very same letter from the Secretary as the "purpose of this legislation." S. Rep. No. 315, 73d Cong., 2d Sess. 1 (1934). There is no evidence that Congress originally had any purpose in considering such legislation other than to address the specific problems noted by the Secretary of the Interior. In fact, the proposed amendment was limited to "matter within the jurisdiction" of the several agencies mentioned by the Secretary.[16] 78 Cong. Rec. 2151, 2858 (1934).

During the course of senatorial debate on S. 2686, *supra*, the phrase "within the jurisdiction of any department or agency of the United States" first appears. 78 Cong. Rec. 2858 (1934). It would be an exaggeration to say that the Senate carefully considered the effect of this language before adopting it. Indeed, the colloquy between Senators Borah and Ashurst makes clear that the Committee on the Judiciary had occasion to consider that option, but refused to so broaden the terms of the law. 78 Cong. Rec. 2858 (1934). It appears from the debates that the phrase, "within the jurisdiction of any department or agency . . ." was added to the bill as a quick concession to Senator Borah, who was concerned that the bill "get all the

[16] S. 2686, *supra*, limited its application to matter "within the jurisdiction of the Secretary of the Interior, Administrator of the Federal Emergency Administration of Public Works, or Administrator of the Code of Fair Competition for the Petroleum Industry. . ." 78 Cong. Rec. 2152 (1934).

'buzzards.'" 78 Cong. Rec. 2858 (1934). What the Senator meant by "buzzards" is not immediately clear, but within the context of the debate, it is certain that he did not have in mind those who make untrue statements to investigatory agencies like the F.B.I. Instead, the surrounding discussion centered on false bid applications and frauds against the treasury as well as the concerns expressed by the Secretary of the Interior in his letter. 78 Cong. Rec. 2858-59 (1934). In fact, one Senator during the course of this debate wanted to make sure that the amendment would curb "lobbying," and in response, the sponsor of the bill, Senator Ashurst, stated that the new legislation would reach "false affidavits . . . fictitious bids, and so forth." 78 Cong. Rec. 2859 (1934). There is not a hint in any of this discussion that unsworn, oral statements to investigative agencies were envisioned as covered by this language.

While S. 2686, *supra*, was being debated in the Senate, a similar measure, H.R. 8046, 73d Cong., 2d Sess. (1934), 78 Cong. Rec. 3724-25 (1934), was under consideration by the House of Representatives. This version, like the proposal before the Senate, was prompted by the concerns of the Secretary of the Interior. H.R. Rep. No. 829, 73d Cong., 2d Sess. 1-2 (1934). Unlike the Senate Bill, however, the House draft initially contained the broad phrase "within the jurisdiction of any department. . . ." 78 Cong. Rec. 3724-25 (1934). Nevertheless, it does not appear that the House intended to reach unsworn oral statements to investigative agencies. That this was indeed not the intent of Congress is made clear in the Judiciary Committee's Report, H.R. Rep. No. 829, *supra*, accompanying H.R. 8046, *supra*. In that Report, the Committee noted that its chief concern was to prevent "collusive bidding," construction fraud, and unfair practices in the petroleum industry, H.R. Rep. No. 829, *supra*, at 1. The Committee went so far as to quote an official of the Department of the Interior who had testified during the hearings regarding the need for this legislation. The official's statement emphasized the necessity to address problems of "collusive bidding, false statements relative to the financial condition of a community . . .,

misrepresentation relative to the production . . . of petroleum . . ., [and] making of false affidavits relative to public-land matters." H.R. Rep. No. 829, *supra*, at 1-2. In explaining why the proposed legislation was broadened to include any agency or department of the Government, the Committee made reference to the aforementioned letter from the Secretary of the Interior and noted that the bill was rewritten to "punish *such acts* committed before any department. . . ." H.R. Rep. No. 829, *supra*, at 2 (emphasis added). By "such acts," the Committee was apparently referring to the kinds of misrepresentations experienced by regulatory agencies and departments listed in the Secretary's letter. That this is surely the meaning intended is confirmed by the Committee's next phrase, ". . . as, for example, the Reconstruction Finance Corporation." H.R. Rep. No. No. 829, *supra*, at 2.

An examination of the floor debate in the House of Representatives underscores the limited impact intended for this legislation. Rep. McKeown, in explaining the purpose of the bill to his colleagues, noted that the existing false statement statute is to be extended so that it is "applicable to the *new operations* of the Government." 78 Cong. Rec. 3724 (1934) (Emphasis added). By "new operations," the Senator apparently was referring to what the Eighth Circuit in *Friedman* understood to be "the newly created regulative agencies," *Friedman*, *supra*, at 366; for Representative McKeown goes on to provide an example of what he means. He refers specifically to problems with "false affidavits as to . . . material that goes into these projects that the United States Government is lending its money to construct." 78 Cong. Rec. 3724 (1934). The draft was extended, the Congressman notes, to include "every species of fraud where an attempt is made to defraud the United States Government *in any of these operations*." 78 Cong. Rec. 3724 (1934) (Emphasis added). Furthermore, when asked whether "this bill [is] aimed at collusive bidding," Representative McKeown replied, "yes." 78 Cong. Rec. 3724 (1934). And when another Congressman expressed the opinion that the real reason for the bill "is that someone who has to do with

the public works program or the C.W.A. program is afraid that the law is not broad enough to reach violations of some of these *numerous spending organizations . . .*," Representative McKeown responded by recalling the testimony of the official from the Department of the Interior concerning "collusive bidding." 78 Cong. Rec. 3724 (1934) (Emphasis added).[17]

2. Subsequent Legislative Inaction Validates The Eighth Circuit's View Of § 1001.

This legislative history indicates that Congress, in utilizing the term "jurisdiction," did not intend to reach the kind of conduct involved in the present case. Subsequent legislative developments strengthen the validity of this conclusion.

Since the decision in the *Friedman*, case, Congress has on at least two separate occasions considered passing legislation which would broaden the reach of § 1001 to embrace unsworn, oral statements given to law enforcement officers. See, s. 1437, 95 Cong., 1st Sess. § 1343 (1977), and S. 1630, 97 Cong. 1st Sess. § 1343 (1981). In both instances, Congress failed to enact these proposals. While evidence of legislative inaction may in general be a " 'poor beacon' to follow in construing a statute" (2A C. Sands, *supra*, § 49.10 at 261), where the legislature is aware of an interpretation of a statute and refuses to act even then, "there is more reason to regard failure of the legislature

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[17] H.R. 8045, *supra*, was passed by the House on March 5, 1934 (78 Cong. Rec. 3724-25 (1934)) and by the Senate on March 29, 1934. 78 Cong. Rec. 5746 (1934). For reasons irrelevant to the present issue, President Roosevelt vetoed the bill on April 17, 1934. 78 Cong. Rec. 6778-79 (1934). Thereafter, the "within the jurisdiction . . ." language amending the false statement law was attached to another bill, H.R. 8912, 73d Cong., 2d Sess. (1934), H.R. Rep. No. 1463, 73d Cong., 2d Sess. 2 (1934), whose main purpose was to punish vandalism against governmental installations. There was virtually no debate concerning the possible reach of the term "jurisdiction," although Senator King seemed to feel that the main reason for the amendment was to prosecute "kick-back" practices. 78 Cong. Rec. 11270 (1934). H.R. 8912, *supra*, was signed into law on June 18, 1934. 78 Cong. Rec. 12451 (1934).

to change the interpretation as presumptive evidence of its correctness." C. Sands, *supra*, § 49.10 at 263. See also, *Blau* v. *Lehman*, 368 U.S. 403, 412-413 (1962). There can be no question that in 1977 and 1981 Congress was cognizant of the *Friedman* interpretation of § 1001, for the Senate Reports accompanying the proposed legislation discuss in some detail the holding and effects of the *Friedman* decision. See, S. Rep. No. 95-605, 95 Cong., 1st Sess. 371-72 (1977), and S. Rep. No. 97-307, 97 Cong., 1st Sess. 403-4 (1981). Congressional inaction in this instance, therefore, is consistent with the legislative history and with *Friedman's* reasonable view of the scope of the statute.[18]

3. In An Ambiguous Penal Statute, A Broad Police Power Cannot Be Assumed, Absent A Legislative History Indicating Awareness Of The Criminal Scope.

Petitioner maintains that, despite the speeches on the floor of the House and Senate, the explanatory statements offered by the Committees in their reports, and the subsequent legislative history, there is nothing from which to conclude any intended limit on the reach of the statute. As demonstrated above, this simply is not the case. But assuming, for argument's sake, the petitioner is correct, and there is little in the history to indicate any limitation on the statute, petitioner can point to nothing that would show any congressional intention to "revolutionize our criminal justice system. If. . . [Congress] had [such an intention], the measure would surely have been subjected to serious, impassioned, and prolonted debate." *United States* v. *Goldfine*, *supra*, at 825 (Ferguson, J., dissenting). No such "debate," of course, occurred, "Instead the

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[18] It is interesting to note that the most recent incarnation of an Omnibus Criminal Code Revision Act contains no proposal for broadening the scope of the false statement laws. H.R. 2013, 98 Cong., 1st Sess. (1983). Section 1744 of H.R. 2013, *supra*, would make it a Class A misdemeanor to provide false information to any federal organization regarding an emergency situation. H.R. 2013, *supra*, is presently before the Subcommittee on Criminal Justice of the House Committee on the Judiciary.

legislative history is that which one would expect to accompany a non-controversial bill designed to punish those who would seek to frustrate a regulatory scheme, unfairly acquire a privilege, or pirate the federal treasury." *Id.* at 825-6. Petitioner "blithely assume[s] that [in § 1001] Congress granted . . . a sweeping power" (*Friedman* v. *United States*, *supra*, at 366), but it should be this Court's position that "such a formidable police authority must be clearly authorized." *Id.* After all, "if the Congress wanted unsworn statements to investigative officials to serve as the basis for severe criminal punishment . . ., it would have said so in clear, direct and positive terms." *Id.* at 367.

Petitioner argues, though, that congressional failure to consider a subject cannot be taken to mean that the subject was not intended to be covered. The cases relied upon by petitioner in support of this proposition, however, all stress that the meaning of the statute must first be obvious on its face. Brief for the United States, p. 27. Even petitioner is compelled to recognize the ambiguity of the key term "jurisdiction." *Id.* at 7. A case more to the point is *Williams* v. *United States*, 458 U.S. 279 (1982). In that instance, this Court was confronted with an ambiguous penal statute involving a false statement provision. In narrowly construing the reach of that legislation, this Court recognized the significance of "a legislative history that fails to evidence congressional awareness of the statute's claimed scope." *Id.* at 290. As Mr. Justice Rehnquist has noted on another occasion:

> In a case where the construction of legislative language . . . makes so sweeping and so relatively unorthodox a change . . . I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.

Harrison v. *PPG Industries Comm., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting).

It is understandable that petitioner would wish to subject Mr. Rodgers to punishment. To stretch an existing statute far beyond its intended purpose is not, however, the appropriate

way to achieve that result. Congress is capable of enacting legislation that would specifically reach the behavior involved in this case and, in fact, has twice considered that possibility. That Congress has not as yet passed such a law may indicate the complexity of the problem involved. For in reaching a *Rodgers*, it is difficult not to touch conduct that ought not to be criminalized. *Friedman* v. *United States*, *supra*, at 366; see also, discussion below, pp. 42 to 45. In any event, this is a problem best left to the careful considerations of Congress which is best qualified to weight and balance competing social interests. For the present, the intent of Congress as expressed in the legislative history and as ascertained through the judicious application of statutory rules of construction must not be forsaken out of concern for a particular set of facts and circumstances.

D. POLICY CONCERNS FAVOR ACCEPTANCE OF THE EIGHTH CIRCUIT'S INTERPRETATION OF THE STATUTE.

Although the result reached in *Friedman* is fully justified by the language and legislative history of the statute, there are additional policy concerns which favor adoption of the Eighth Circuit's analysis. The *Friedman* rule serves several useful social and legal functions.

1. *Friedman* Promotes An Open Line Of Communication Between Law Enforcement And The Public.

Friedman's common-sense interpretation of § 1001 promotes "the important social policy that is served by an open line of communication between the general public and law enforcement agencies." *Friedman* v. *United States*, *supra*, at 369.[19] In petitioner's view, innocent persons acting in good faith will not be deterred by the unchecked authority to prosecute oral, unsworn statements. Surely this is a naive position; for the

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[19] See also, Broeder, *Silence and Perjury Before Police Officers*, 40 Neb. L. Rev. 63, 99-100 (1960).

mere threat of a felony prosecution must exercise a chilling effect on the public's interaction with law enforcement agencies. This is especially true where the penalties provided by law are harsh and the individuals with whom criminal investigative agencies such as the F.B.I. must often deal are "underworld" types already suspicious of the legal system. It does little good to argue that the agencies themselves can be trusted not to jeopardize the free flow of information necessary for effective law enforcement. It is the perceived fear of the possibility of a felony charge based on nothing more than an officer's recollection of unrecorded oral statements that will threaten to dry up valuable source information. The irony of the petitioner's position for a wide open interpretation of § 1001 is that such a view of the statute may result, not in the overall deterrence of criminal activity, but in its encouragement. With an unfettered reading of the statute, information that could lead to arrests may be increasingly difficult to obtain.

2. *Friedman* Protects The Exercise Of Civil Rights.

There is also the fear that under an expansive view of § 1001, individuals who have been mistreated while in custody may hesitate to lodge colorable complaints against the offending officers. That this is not an idle concern is evident from the *Friedman* case itself. The facts as related by the Eighth Circuit indicate that the civil rights violations alleged by Mr. Friedman to have occurred may indeed have had some basis in truth. *Friedman* v. *United States*, *supra*, at 365. Nevertheless, Mr. Friedman was tried and convicted under an expansive view of § 1001 and would have gone to jail for his "crime" had it not been for the reasonable approach of the Eighth Circuit. It is difficult to imagine a more effective restraint on the exercise of a prisoner's civil rights than an interpretation of the law that gives the jailer nearly unlimited discretion to determine when a false statement has been made. The *Friedman* rule is necessary to continue to protect the civil rights of those who would not otherwise pursue those rights

our of fear that the authorities may utilize their broad discretion for purposes of self-protection or even revenge.

3. *Friedman* Disposes Of The "Exculpatory-No" Problem.

The rule announced in *Friedman* is useful as well in harmonizing difficult legal and factual problems. The "exculpatory-denial" situation is a good example. Under a literal interpretation of the statute, such a false denial is clearly subject to prosecution. While many courts have allowed for the exception, the rationale for, and exact scope of, and exception are not always made clear. *Paternostro* v. *United States*, 311 F.2d 298, 305 (5th Cir. 1962). Certainly, there is a logical inconsistency in excluding a denial but punishing other kinds of statements. After all, a "denial" may be intrinsically no less false or misleading than any other kind of statement. Moreover, there is often a factual problem in deciding when a statement constitutes a negative "denial" or a positive "statement." See *United States* v. *Bedore*, 455 F.2d 1109 (9th Cir. 1972); *United States* v. *Bush*, 503 F.2d 813 (5th Cir. 1974). Under the precedent established by *Friedman*, however, the "exculpatory-no" doctrine is, at least in part, resolved, since virtually any statement to an investigative agency given during the course of an investigation falls outside the scope of the statute.[20]

4. *Friedman* Harmonizes The *Bronston* Problem.

The importance of the *Friedman* precedent becomes apparent in another context as well. Until recently, there has been little question that a statement, if contemplated by the act,

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[20] Petitioner asserts that this Court need not concern itself with the "exculpatory-no" issue, since this case does not directly raise that question. Brief for the United States, p. 10, n. 2. It is difficult to see how a decision in this case could avoid having a very substantial impact in that area. Certainly, adoption of petitioner's wide-open interpretation of § 1001 must be read as at least an implied disapproval of the "exculpatory-no" exception. Petitioner, in any case, makes no suggestion as to the probable effect acceptance of his view might have on the "doctrine."

may be either written or oral. *United States* v. *Beacon Brass*, 344 U.S. 43, 46 (1952). This Court in *Bronston* v. *United States*, 409 U.S. 352 (1973), limited the scope of the perjury statute by ruling that misleading statements which are technically true do not constitute a violation of that law. This ruling has reopened the question of whether oral as well as written statements are "statements" for purposes of § 1001. If a *Bronston* defense is permitted to defendants under § 1001, then that defense is not truly available unless the statement in question is in writing; for, where the statement is not in writing, the defendant may be faced with the difficult, if not impossible, task of "arguing that his statements . . . were literally true on the sole basis of the agent's sketchy notes. . . ." *United States* v. *Ehrlichment*, 379 F.Supp. 291, 292 (D.C. Cir. 1974). In *United States* v. *Poutre*, 646 F.2d 685 (1st Cir. 1980, the need for written testimony as a foundation for a § 1001 charge was seriously considered, since, "what is actually said by a defendant becomes a critically important part of any prosecution under § 1001." *Id.* at 688.[21] See also *United States* v. *Ehrlichman*, *supra*, and *United States* v. *Clifford*, 426 F.Supp. 696 (E.D. N.Y. 1976). Under the *Friedman* precedent, however, the Bronston problem, at least in the context of statements to investigative agencies, is rendered moot, since such statements, whether oral or written, are not cognizable under the statute.[22]

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[21] The *Poutre* Court did stop short of making a blanket ruling that false statements charged under § 1001 must be in writing.

[22] At least one commentator has advocated a limitation of the false statement law to written or recorded statements. Note, *Criminal Liability for False Statements to Federal Law Enforcement Officials*, 63 Va. L. Rev. 451, 471-73 (1977). But see, *United States* v. *Fern*, 696 F.2d 1269 (11th Cir. 1983).

II. IN THE ALTERNATIVE, SHOULD THIS COURT IMPOSE A NEW RULE ON THE EIGHTH CIRCUIT AND FIND THAT THE PRESENT INDICTMENT DOES STATE A CRIME, SUCH NEW RULE SHOULD NOT BE APPLIED RETROACTIVELY TO THE DEFENDANT.

Although the *ex post facto* ban found in Article I of the United States Constitution has been held not to apply to judicial decisions, *Frank* v. *Mangum*, 237 U.S. 309, 344 (1915), the rationale behind the constitutional prohibition has been extended by analogy to court rulings. Thus, this Court has said that, under the Due Process Clause, an appellate court may not do what the *Ex Post Facto* Clause prohibits the legislature from doing. *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964); *Rabe* v. *Washington*, 405 U.S. 313 (1972); *Douglas* v. *Buder*, 412 U.S. 430 (1973); *Marks* v. *United States*, 430 U.S. 188 (1977). In *Bouie*, for example, a state appellate court upheld the defendant's conviction and in so doing interpreted a state statute in a new and unexpected manner. This Court, in reversing the conviction, found that the State Court had expanded the reach of the statute to include what had previously been thought to be innocent conduct. Such

> an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction . . . The fundamental principle that "the required criminal law must have existed when the conduct in issue occurred," . . . must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures.

Id. at 353-4, quoting, Hall, *General Principles of Criminal Law* (2d ed. 1960) at 58-59.

While due process protection against retroactive judicial decisions may not be coextensive with the *ex post facto* ban

against legislation that attempts to reach prior acts, W. LaFave, A. Scott, Jr., *Criminal Law*, Chapter 2, § 12 (1972 ed.) at 94-95, there can be little question that the due process guarantee extends to cases where an appellate court has declared heretofore non-criminal conduct to be in fact within the ambit of the law. As noted by W. LaFave and A. Scott:

> Perhaps the easiest case is that in which a judicial decision subsequent to the defendant's conduct operates to his detriment by overruling a prior decision which, if applied to the defendant's case, would result in his acquittal. For example, the later decision may . . . interpret a criminal statute as covering conduct previously held to be outside this statute. Under such circumstances, the overruling decision (whether on appeal of the defendant's case or in another case decided subsequent to his conduct) is not applied retroactively, . . .

W. LaFave, A. Scott, *supra*, at § 12, 94-95.

To be sure, the *Bouie* decision does not specifically involve a judicial reversal of a prior holding, but rather concerns a judicial interpretation of a state statute not previously construed. Nevertheless, the rationale of the *Bouie* holding has been applied in circumstances very similar to the case at bar. In *United States* v. *Goodheim*, 651 F.2d 1294 (9th Cir. 1981), the issue was whether a Supreme Court decision interpreting expansively the word "convicted" in 18 U.S.C. § 1202(a)(1) [felon in possession of a firearm] could be applied retroactively to the defendant. The Ninth Circuit held that retroactively application of that Supreme Court ruling would, in view of *Bouie*, be "barred by the due process clause of the fifth amendment." *United States* v. *Goodheim*, *supra*, at 1298. A similar result on somewhat different facts was reached in *United States* v. *Wasserman*, 504 F.2d 1012 (5th Cir. 1974).[23]

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[23] The *Wasserman* case involved the application to a particular defendant of a new interpretation of an obscenity law. Siginificantly, the *Wasserman* Court found a violation of due process despite the *Bouie* Court's notation that *ex post facto* considertions are especially compelling where the conduct is not improper or immoral.

Applying these principles to the present case, it is clear that should this Court adopt petitioner's plea and render false oral statements to an investigatory agency culpable under § 1001, such holding would be a wide departure from previous rulings in the Eighth Circuit and could not be applied to this defendant without depriving him of due process of law. This conclusion is particularly compelling in view of the fact that the Court in *Friedman*, in holding that investigative agencies such as the F.B.I. do not possess the "jurisdiction" required by the statute, gave no indication that this interpretation was in any way limited to the particular facts of that case. Rather, the rule was intended to promote a broad social policy and hence must be considered to have general applicability.

Nor can it be argued successfully that no due process violation has occurred in this case becuase the defendant was not shown to have been aware of the *Friedman* case and, therefore, must have known that what he did was against the law. First, there is no indication in the present record that the defendant was ever warned by an agent of the F.B.I. or the Secret Service that he could be liable for making fictitious statements to those agencies. See, Transcript of Proceedings taken on December 3, 1982, filed January 7, 1983 (J.A. 2); and "Stipulation of Facts in Connection with Defendant's Pretrial Motion to Dismiss the Indictment," filed December 8, 1982 (J.A. 1). Second, the language in § 1001, particularly the term "jurisdiction," is subject to various interpretations and provides "inadequate guidance to the individual whose conduct is regulated." *Bouie* v. *City of Columbia*, *supra*, at 353, quoting, Freund, *The Supreme Court and Civil Liberties*, 4 Vand. L. Rev. 533, 541 (1951). Where courts cannot agree on the meaning of a statute, it is unreasonable to expect the average citizen to make an accurate guess as to the conduct prohibited. Finally, personal knowledge of a defendant is not a factor in determining whether due process has been denied. As this Court stated in *Bouie:*

> The determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis

> of the statute itself *and the other pertinent law*, rather than on the basis of an *ad hoc* appraisal of the subjective expectations of particular defendants.

Id. at 355-56, n. 5. (Emphasis added).

A redefinition of the word "jurisdiction" at this time without any prior warning would have the result of suddenly widening the reach of the statute so as to make criminal for the first time in the Eighth Circuit conduct which heretofore had been declared no violation of the law. Such a judicial reconstruction of this criminal statute would be, in light of past pronouncements by the Eighth Circuit, " 'unexpected . . .,' [and, as a result] it must not be given retroactive effect." *Bouie* v. *City of Columbia*, *supra*, at 354, quoting, Hall, *supra*, at 61.

CONCLUSION

WHEREFORE, the judgment of the Court of Appeals should be affirmed. In the alternative, any new rule of law should not be applied retroactively to the defendant, since to do so would violate the Fifth Amendment's guarantee for due process of law.

Respectfully submitted,

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